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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Appellant, v. KATHY LEE URBANEK, Defendant and Respondent.	E069141 (Super.Ct.No. 16CR071307) OPINION

APPEAL from the Superior Court of San Bernardino County. Cara D. Hutson, Judge. Reversed.

Michael A. Ramos, District Attorney, and Mark A. Vos, Deputy District Attorney, for Plaintiff and Appellant.

Marianne Harguindeguy, under appointment by the Court of Appeal, for Defendant and Respondent.

The court granted defendant and respondent, Kathy Lee Urbanek's, Penal Code section 995[1] motion to set aside the information. Plaintiff and appellant, the People, appeal, contending the court abused its discretion in granting defendant's section 995 motion. We reverse the judgment and remand the matter for further proceedings.

I. FACTUAL AND PROCEDURAL BACKGROUND

The People charged defendant by felony complaint with two counts of identity theft. (§ 530.5, subd. (a); counts 1-2.) At the preliminary hearing on May 2, 2017, alleged victim 1, the purported victim of the count 1 offense, testified that she had known defendant for 17 years, had lived with her at one point in time, and that she had considered defendant her best friend.

In the week prior to December 19, 2015, alleged victim 1 received a letter in the mail from a credit department informing her she had been denied a loan at Chaparral Motor Sports (Chaparral) in San Bernardino. Alleged victim 1 called Chaparral and was connected to Josepeh Loepke;[2] after telling him she had not applied to purchase a motorcycle on credit, Loepke told her to come down to Chaparral.

On or about December 19, 2015, alleged victim 1 went to Chaparral and spoke with Loepke and the sales manager. They took her into the back office, asked her for

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[1] All further statutory references are to the Penal Code.

[2] The reporter's transcript actually reflects that alleged victim 1 spoke with "Joey Lucky"; however, the parties agree that references in the transcript to "Joey Lucky" are actually references to Joseph William Loepke.

identification, and flipped through a file. Alleged victim 1 saw defendant's signature on the paperwork in the file.

Alleged victim 1 testified she did not purchase a motorcycle from Chaparral in December 2015; she never consigned a loan agreement with defendant for a motorcycle. She never went with defendant to buy a motorcycle or gave defendant permission to use her name.

In October 2016,[3] alleged victim 1 had discussed with defendant, defendant's desire to purchase a motorcycle on defendant's husband's credit. She told defendant it would "be a bad idea because they struggle for money and it would be a fight at the end of the month when [defendant's husband] would have to make the payment."

A San Bernardino County Sheriff's detective testified that on October 25, 2016, he began a theft investigation by going to Chaparral. He spoke with the sales manager for Chaparral. The sales manager informed him they had received an online credit application from defendant, which was denied. The application was later modified to the name of alleged victim 2.

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[3] Alleged victim 1 testified that she spoke with defendant in October. Defense counsel objected on the basis that the date was vague as to which year. The court sustained the objection. Alleged victim 1 testified it was October 2016. The People contend alleged victim 1's testimony that her attempt to dissuade defendant from purchasing a motorcycle on credit occurred in October *2016*, was either a mistake in her testimony or a transcription error. The People note defendant and alleged victim 1 went to Chaparral together to seek autographs on October 29, 2015, the alleged crimes had already occurred by December 2015, and the investigation of the alleged crimes began on October 25, 2016. Defendant disagrees. Defendant argues there is no "compelling evidence that either the transcription or [alleged victim 1's] testimony is mistaken." Although we observe 2015 would make more sense, we will simply note the disagreement, but find that it is of no consequence to the issues before us.

The detective then spoke with Loepke. Loepke gave him a photocopy of a driver's license and credit card belonging to defendant. Loepke identified defendant from the photograph on the driver's license. Loepke told the detective that they believed the credit application was fraudulent. Loepke told the detective they asked defendant, whom they believed to be alleged victim 1, to come in and produce identification when they signed the paperwork. Thereafter, two women came in; one was identified as defendant; she signed a purchase agreement as the coborrower for a 2016 KTM 65cc dirt bike; the other woman signed alleged victim 1's name. The second woman was unable to provide identification; she only brought in a piece of mail with alleged victim 1's name on it which she attempted to use for identification.

The detective spoke with alleged victim 2 on November 30, 2016. Alleged victim 2 informed him he had been contacted by personnel from Chaparral to whom he told he had never applied for credit with Chaparral.[4]

Defense counsel argued that there was a lack of foundation laid to connect defendant with the online application or purchasing agreement. Thus, defense counsel contended insufficient evidence supported holding his client to answer. To the extent the court ruled otherwise, defense counsel moved to reduce the counts to misdemeanors pursuant to section 17, subdivision (b).

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[4] Defense counsel interspersed the direct testimony of the witnesses with multiple evidentiary objections on the bases of multiple hearsay, lack of foundation, nonresponsive, narrative, and vagueness. The court overruled many of the objections, sustained some of them while allowing later answers in once clarified, and sustained yet other objections. We shall address more fully defendant's argument with respect to the evidentiary objections in the discussion section of this opinion.

The court noted: "This is a close call for a [section] 17[, subdivision] (b) in the Court's mind. However, I think what sways the Court is the way, at least based on the evidence, that the defendant went about conducting or attempting to conduct the transaction in the victims' names, specifically involving at least one person she knew as her best friend . . . . And also, the value of the property, I didn't hear specifically any value, but the Court will assume, based on the fact these are new motorcycles, the value of this property was at least several thousand dollars. And based on that, the Court is going to deny the [section] 17[, subdivision] (b) even though it's a close call." The court ruled there was sufficient cause to hold defendant to answer for the charges.

On May 2, 2017, the People filed a felony information mirroring the charges in the complaint. On July 19, 2017, defense counsel filed a section 995 motion contending the evidence was insufficient to hold defendant to answer because the court relied upon multiple layers of hearsay over the objections of defense counsel. The People filed opposition to the motion.

On August 25, 2017, the court held a hearing on the section 995 motion. After responding point-by-point to defense counsel's asserted evidentiary complaints, the court denied the section 995 motion, but stated: "I do believe . . . this is misdemeanor conduct. I'm [section] 17[, subdivision] (b)ing it." The People noted: "Your Honor, just for the record, I don't believe that the Court has the authority to [section] 17[, subdivision] (b) at this point." The court replied: "Then I'm going to grant it. It's one or the other. It's—

this is not felony conduct. It's not. So if that's your argument, the Court will grant the [section] 995 [motion]."

II. DISCUSSION

A. *Section 995 Motion*

The People contend the court erred in granting the section 995 motion after it had already found sufficient evidence to uphold the magistrate's order holding defendant to answer. We agree.

"'[I]n proceedings under section 995 it is the magistrate who is the finder of fact; the superior court has none of the foregoing powers, and sits merely as a reviewing court; it must draw every legitimate inference in favor of the information, and cannot substitute its judgment as to the credibility or weight of the evidence for that of the magistrate. [Citation.] On review by appeal or writ, moreover, the appellate court in effect disregards the ruling of the superior court and directly reviews the determination of the magistrate . . . .' [Citations.]" (*People v. Gonzalez* (2017) 2 Cal.5th 1138, 1141.)

"We review the evidence in support of the information 'to determine whether as a matter of law it is sufficient, not whether the trial court's ruling was reasonable. [Citations.]'" (*Alvarado v. Superior Court* (2007) 146 Cal.App.4th 993, 1000.) "A magistrate conducting a preliminary examination 'must be convinced of only such a state of facts as would lead a man of ordinary caution or prudence to believe, and conscientiously entertain a strong suspicion of the guilt of the accused. [Citations.]' If there is some evidence to support the magistrate's order, the reviewing court will not

inquire into its sufficiency. 'Thus, an indictment or information should be set aside only when there is a total absence of evidence to support a necessary element of the offense charged. [Citations.]'" (*Id*. at pp. 999-1000, fns. omitted.)

Under section 17, subdivision (b), a court has authority to reduce a wobbler offense from a felony to a misdemeanor only in the following circumstances: "(1) After a judgment imposing a punishment other than imprisonment in the state prison or imprisonment in a county jail under the provisions of subdivision (h) of Section 1170. [¶] (2) When the court, upon committing the defendant to the Division of Juvenile Justice, designates the offense to be a misdemeanor. [¶] (3) When the court grants probation to a defendant without imposition of sentence and at the time of granting probation, or on application of the defendant or probation officer thereafter, the court declares the offense to be a misdemeanor. [¶] (4) When the prosecuting attorney files in a court having jurisdiction over misdemeanor offenses a complaint specifying that the offense is a misdemeanor, unless the defendant at the time of his or her arraignment or plea objects to the offense being made a misdemeanor, in which event the complaint shall be amended to charge the felony and the case shall proceed on the felony complaint. [¶] (5) When, at or before the preliminary examination or prior to filing an order pursuant to Section 872, the magistrate determines that the offense is a misdemeanor, in which event the case shall proceed as if the defendant had been arraigned on a misdemeanor complaint."

"[U]nless the People consent to a reduction of the charged offense, the establishment of defendant's guilt, whether by plea or trial, must *precede* a court's reduction of a wobbler to a misdemeanor under Penal Code section 17, subdivision (b)(3)." (*People v. Superior Court* (*Jalalipour*) (2015) 232 Cal.App.4th 1199, 1201-1202.) "[T]he establishment of the defendant's guilt, whether by plea or at trial, must *precede* a court's section 17[, subdivision] (b)(3) reduction of a wobbler to a misdemeanor . . . ." (*Id.* at pp. 1207-1208.) "[I]f the magistrate finds the People have appropriately charged the defendant with a felony, the defendant is held to answer for the felony charge. [Citation.] Thereafter, only the prosecution may reduce the charge, because the executive alone is entrusted with '[t]he charging function' and has the sole 'prerogative to conduct plea negotiations.' [Citations.]" (*Id*. at pp. 1208-1209.) "'"[I]n view of the fundamental right of the People to prosecute defendants upon probable cause to believe they are guilty [citations], neither judicial convenience, court congestion, nor judicial pique, no matter how warranted, can supply justification for an order of dismissal." [Citation.]'" (*People v. Henderson* (2004) 115 Cal.App.4th 922, 939.)

Here, by initially denying the section 995 motion, the court found that at least "some evidence" supported the magistrate's order holding defendant to answer. The court noted that Loepke had a photocopy of defendant's driver's license and later identified her in a lineup. The court observed that Loepke was in defendant's presence when she signed the purchase agreement in alleged victim 1's name. Defense counsel conceded that the evidence that Loepeke was in defendant's presence was not subject to

exclusion on the grounds of multiple hearsay. Thus, "some evidence" supported the charge against defendant with respect to victim 1.

The court also noted that alleged victim 2 directly informed the detective that he had not applied for credit with Chaparral. Defendant contended that evidence constituted inadmissible hearsay. The court disagreed, finding that alleged victim 2 could tell the detective he never applied for credit which would properly come into evidence as single layer hearsay through section 872, subdivision (b): "He's telling a deputy, I never applied." Thus, "some evidence" also supported holding defendant to answer for the count 2 offense.

Nevertheless, despite finding that the evidence supported the magistrate's order holding defendant to answer on both charges, the court believed the conduct underlying the charges amounted to only misdemeanor offenses. Thus, the court purported to reduce the charges to misdemeanors pursuant to section 17, subdivision (b). However, the People correctly pointed out that the court lacked authority, at that point in time, to reduce the charges pursuant to section 17, subdivision (b). The court then stated: "Then I'm going to grant it. It's one or the other. It's—this is not felony conduct. It's not. So if that's your argument, the Court will grant the [section] 995 [motion]."

The court had no authority to grant the section 995 motion because it believed the alleged conduct amounted to a misdemeanor rather than a felony. (*Jackson v. Superior Court* (1980) 110 Cal.App.3d 174, 176-177.) Instead, the court's ruling appears to be one of "judicial pique" which cannot support its order granting defendant's section 995

motion. (*People v. Henderson*, *supra*, 115 Cal.App.4th at p. 939.) This is particularly so where the court had already found sufficient evidence to support the magistrate's order holding defendant to answer on both charges. The court's belief that the conduct warranted only misdemeanor charges could not supply the basis for effectively dismissing the information in its entirety.

As the People point out, in *Jackson v. Superior Court*, *supra*, 110 Cal.App.3d 174, the People charged the defendant with the felony wobbler offense of theft from a person. (*Id*. at p. 176.) At the preliminary hearing, the defendant sought to have his offense reduced to a misdemeanor pursuant to the court's authority under section 17, subdivision (b)(5). (*Ibid*.) The magistrate refused to exercise his discretion to reduce the offense unless the defendant entered a guilty plea. (*Id*. at pp. 176-177.) The court held "that the magistrate may not condition the exercise of his judicial discretion to reduce the offense to a misdemeanor upon the entry of a plea of guilty by the defendant [citation]." (*Ibid*., fn. omitted.) The court additionally held "that a defendant's right to an independent determination of whether he should be held to answer on a felony or a misdemeanor cannot be given meaningful effect unless the defendant may raise the magistrate's failure to exercise his judicial discretion through a pretrial motion to dismiss [citation]." (*Id*. at p. 177.)

Similarly, in *People v. Manning* (1982) 133 Cal.App.3d 159, the defendant appealed the denial of his section 995 motion on the basis that the People had added felony wobbler counts to the information which were not included in the complaint and

were thus not subject to a section 17, subdivision (b)(5) motion to reduce the counts to misdemeanors at the preliminary hearing. (*People v. Manning*, *supra*, at pp. 164-165.) The court noted that while *Jackson* had held that "[s]ince there should be a method other than by writ to challenge a misapplication of Penal Code section 17, subdivision (b)(5), a Penal Code section 995 motion to set aside the charge provides a quick and efficient remedy," that holding only applied in cases where the magistrate refused to exercise his discretion pursuant to section 17. (*People v. Manning*, *supra*, at pp. 165-166.)

Here, unlike in both *Jackson* and *Manning*, the magistrate did not refuse to exercise his discretion. The magistrate explicitly noted: "This is a close call for a [section] 17[, subdivision] (b) in the Court's mind." Nonetheless, the magistrate expressly exercised his discretion by declining to reduce the felony charges to misdemeanors pursuant to section 17, subdivision (b): "[T]he Court is going to deny the [section] 17[, subdivision] (b) even though it's a close call." Thus, the court had no authority to reduce the offenses to misdemeanors or grant the section 995 motion based solely on its opinion that the offenses should be charged as misdemeanors.

B. *Section 1385*

Defendant contends any error in the court's ruling is harmless because the court had the authority to dismiss the entire case pursuant to section 1385. We disagree.

Pursuant to section 1385, subdivision (a): "The judge or magistrate may, either of his or her own motion or upon the application of the prosecuting attorney, and in furtherance of justice, order an action to be dismissed. The reasons for the dismissal shall

be stated orally on the record. The court shall also set forth the reasons in an order entered upon the minutes if requested by either party or in any case in which the proceedings are not being recorded electronically or reported by a court reporter. A dismissal shall not be made for any cause that would be ground of demurrer to the accusatory pleading." Section 1385's requirement that the court state its reasons for dismissing a charge is mandatory and the court's failure to states its reason cannot be deemed harmless. (*People v. Bonnetta* (2009) 46 Cal.4th 143, 151-152 [remanding matter to trial court for statement of reasons].) If a court intends to dismiss a matter, the People must be given notice of such an intent. (*People v. Gonzales* (1965) 235 Cal.App.2d Supp. 887, 889.)

Here, the court never mentioned that it was dismissing the action pursuant to section 1385. The court never provided the People the opportunity to argue that dismissal of the matter was not "in furtherance of justice." Furthermore, the court did not state any reasons for dismissing the matter "in furtherance of justice." Thus, the court's error in granting defendant's section 995 motion cannot be deemed harmless due to the court's section 1385 authority.

C. *Evidentiary Objections*

Finally, defendant contends that even if the court erred in granting his motion on the grounds stated, any finding by the court that some admissible evidence supported the magistrate's ruling was error. Defendant maintains that the only evidence supporting the

magistrate's order holding defendant to answer was erroneously admitted over defendant's hearsay and lack of foundation objections.

"Proposition 115 does *not* authorize the use of double or multiple hearsay statements and such testimony is admissible only if it qualifies under some other exception to the hearsay rule. [Citations.]" (*Tu v. Superior Court* (1992) 5 Cal.App.4th 1617, 1622.) Where a magistrate's finding of probable cause was based on improper and unauthorized multiple hearsay, a superior court should grant a defendant's motion to set aside the information under section 995. (*Tu v. Superior Court, supra*, at p. 1624; accord, *People v. Daily* (1996) 49 Cal.App.4th 543, 549 [a superior court judge may review "hearsay and other evidentiary questions presented by a magistrate's determination to hold the accused to answer."]; accord, *People v. Hawkins* (2012) 211 Cal.App.4th 194, 204 [erroneous admission of hearsay evidence at preliminary hearing may be raised in a § 995 motion]; see *People v. Sullivan* (1963) 214 Cal.App.2d 404, 409-410 ["A full-scale review of the evidentiary rulings of the magistrate is not provided by section 995. '. . . The only qualification to this principle is that a defendant has been held to answer without reasonable or probable cause if his commitment is based entirely on incompetent evidence.'"]; see *People v. Backus* (1979) 23 Cal.3d 360, 387 ["An indictment based solely on hearsay or otherwise incompetent evidence is unauthorized and must be set aside on motion under Penal Code section 995."].)

"'The elements of the crime [of identity theft] . . . may be summarized as follows: (1) that the person willfully obtain personal identifying information belonging to

someone else; (2) that the person use that information for any unlawful purpose; and (3) that the person who uses the personal identifying information do so without the consent of the person whose personal identifying information is being used.' [Citation.]" (*People v. Lee* (2017) 11 Cal.App.5th 344, 355-356; CALCRIM No. 2040.)

As to count 1, the detective testified that Chaparral's sales manager informed him that they received an online credit application from defendant. Loepke told the detective they believed the application was fraudulent. Alleged victim 1 testified that she had received a letter from Chaparral informing her that she had been denied a loan for which she had not applied. Although testimony regarding the contents of the letter would normally be hearsay, in this instance it was properly admitted not for the truth of the matter asserted therein, but for the nonhearsay purpose to show why alleged victim 1 went to Chaparral. (*People v. Zavala* (2013) 216 Cal.App.4th 242, 249-250 [testimony regarding contents of call records properly admitted to explain the detective's subsequent actions].)

Lopeke told the detective that defendant came into Chaparral and signed a purchase agreement for a motorcycle. Loepke told the detective another woman was with defendant when she signed the purchase agreement; that woman signed alleged victim 1's name on the purchase agreement. Loepke told the detective that the other woman brought in a piece of mail with alleged victim 1's name on it which she attempted to use as identification. Loepeke gave the detective the purchase agreement. These items of

evidence all consist of one layer of hearsay and were properly admitted pursuant to Proposition 115. (§ 872, subd. (b).)

The rational inference of alleged victim 1 and the detective's testimonies is that the original application contained alleged victim 1's name as either the primary borrower or a cosignor. Thereafter, due to a suspicion of fraud, Chaparral required defendant to personally come into the establishment to prove alleged victim 1's identity. Defendant came into the establishment with another woman who attempted to pass as alleged victim 1, the woman provided personal identifying information containing alleged victim 1's name in order to obtain the loan, and the woman signed the purchase agreement with alleged victim 1's name.

Alleged victim 1 testified she saw defendant's signature on paperwork at Chaparral after she received a letter from a credit department informing her she had been denied a loan at Chaparral. Alleged victim 1 testified she had not purchased a motorcycle from Chaparral in December 2016, she did not cosign a loan for defendant, and never gave defendant permission to use her name. Thus, the properly admitted evidence that defendant had signed a purchase agreement containing alleged victim 1's name without her permission was sufficient evidence to support the magistrate's order holding defendant to answer for the count 1 offense of identity theft.

With respect to count 2, the detective testified that the sales manager informed him that the original application had been modified to contain the name of alleged victim 2. The magistrate implicitly overruled defendant's objection that the testimony contained

double hearsay when he sustained defense counsel's objection only on the grounds of narrative.

"Where '"the very fact in controversy is whether certain things were said or done and not . . . whether these things were true or false, . . . in these cases the words or acts are admissible not as hearsay[,] but as original evidence."' [Citation.] For example, documents containing operative facts, such as the words forming an agreement, are not hearsay. [Citations.] The operative facts rule also applies in an action for fraud. [Citations.]" (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 316 [documents offered as direct evidence of fraudulent statements properly admitted as nonhearsay].) "'If a fact in controversy is whether certain words were spoken or written and not whether the words were true, evidence that these words were spoken or written is admissible as nonhearsay evidence.' [Citation.] Often, such evidence is referred to as '"operative facts."' [Citations.] As originally articulated, the operative fact doctrine was as follows: '"There is a well-established exception or departure from the hearsay rule applying to cases in which the very fact in controversy is whether certain things were said or done and not as to whether these things were true or false, and in these cases the words or acts are admissible not as hearsay, but as original evidence." [Citations.] In these situations, the words themselves, written or oral, are "operative facts," and an issue in the case is whether they were uttered or written. [Citation.]' [Citation.]" (*People v. Fields* (1998) 61 Cal.App.4th 1063, 1068-1069; see also *People v. Henry* (1948) 86 Cal.App.2d 785, 789; *People v. Rosson* (1962) 202 Cal.App.2d 480, 486.) Thus, that the original

application had been modified to contain alleged victim 2's name was an operative fact which was properly admitted as nonhearsay evidence.

Alleged victim 2 informed the detective he had been contacted by personnel from Chaparral whom he told he had never applied for credit. Defense counsel objected on the grounds that the statement was nonresponsive and double hearsay. The magistrate sustained the objection "as to statements by [alleged victim 2] for the purposes of—for the truth of the matter asserted; however it would be admitted only for the purposes of showing subsequent course of conduct and the investigation conducted by" the detective. The People then asked the detective whether alleged victim 2 told the detective whether he had ever made a purchase from Chaparral. The detective responded that alleged victim 2 said he never had. The detective testified that alleged victim 2 told the detective he neither knew alleged victim 1 nor did he ever give her his information.

At the hearing on the section 995 motion, defense counsel contended alleged victim 2's statement to the detective "that he never applied for credit with" Chaparral, consisted of "multiple layers of hearsay." However, the court stated: "But the witness can tell [the detective] through Prop[osition] 115, I never applied for credit. If I told the deputy right now, I never applied for credit, he could testify to that on the stand. He could." Defense counsel replied: "The statement is him speaking with someone at Chaparral Motor Sports; right? So that's that second layer of hearsay." The court responded: "I see your point in that he said he told Chaparral Motors that he had never applied, but the Court extrapolated that not as hearsay that he never applied. I don't care

what he told somebody. He's telling a [detective], I never applied. I got a call. I never applied. I told these people that." Thus, alleged victim 2's statement that he had been contacted by personnel from Chaparral whom he told he had never applied for credit would be properly admitted as single layer hearsay under Proposition 115. Therefore, sufficient evidence also supported the magistrate's order holding defendant to answer for identity theft in count 2.

III. DISPOSITION

The judgment granting the section 995 motion is reversed and the matter is remanded for further proceedings.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

McKINSTER
Acting P. J.

We concur:

MILLER
J.

SLOUGH
J.